UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAE APPLIED TECHNOLOGIES, LLC	)	
	)	
and	)	Case No. 28-CA-165334
	)	28-CA-170331
SECURITY POLICE ASSOCIATION OF NEVADA.	)	
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PAE APPLIED TECHNOLOGIES, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINSTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENTS.

Respondent PAE Applied Technologies, LLC ("PAE" or "Respondent") submits this Brief in support of its Exceptions to the Decision and recommended Order of Administrative Law Judge Amita Baman Tracy ("ALJ") (the "ALJ"), dated December 5, 2016,[1] in the above referenced matter. As detailed below, the ALJ erroneously concluded that Respondent engaged in the following conduct in violation of Sections 8(a)(1) and (a)(3) of the National Labor Relations Act ("NLRA" or the "Act"):

- That PAE violated the *Weingarten* rights of employee John Poulos ("Poulos") on four separate occasions – February 18, 19, 22, and 24, 2016 – when it denied his request to bring an outside attorney, Nathan Ring ("Ring"), to an investigatory interview even though PAE had offered Poulos several alternative union officials to serve as his union representative during the interview.
- That PAE further violated the *Weingarten* rights of employee Poulos by refusing to allow his two union representatives to participate and assist him during a February 24, 2016 investigatory interview despite the Union's own acknowledgement that they were present and did, in fact, participate in the interview.
- That PAE unlawfully disciplined Poulos by issuing him a final written warning on March 24, 2016 allegedly because of his union and protected, concerted

[1] References to ALJ Amita Baman Tracy's December 5, 2016 Decision and recommended Order will be cited herein to as "ALJD."

activities when the credible evidence in the record demonstrated that the warning was not because of conduct protected by the Act, but rather the rude manner in which he questioned the authority of a representative of PAE's customer (the U.S. Air Force) who subsequently complained to PAE about Poulos' conduct.

- That PAE unlawfully interrogated Poulos on February 24, 2016 when it conducted an investigatory interview regarding his contact with the customer that resulted in a complaint that had the potential to impact PAE's contract with the U.S. Government.
- That PAE unlawfully promulgated and maintained a rule or directive that union representatives not be permitted to participate in any defense or ask any questions, but only be permitted to ask questions upon notification by PAE that they may talk after the completion of the investigatory interviews.
- That PAE unlawfully promulgated and maintained a rule or directive that, based on the request of PAE's customer, Poulos or any other Union officer refrain from directly contacting any customer officials on any matters involving the collective bargaining agreement (CBA) between the Company and the Union and that those issues be brought to the proper member of the PAE chain of command.

In addition, the ALJ erroneously concluded that PAE also engaged in a violation of Sections 8(a)(1) and (5) of the Act by failing to offer to bargain with the Union for an accommodation of interests in response to the Union's request for information, including

a classified complaint lodged against Poulos by the U.S. Air Force, as well as the allegations contained within the complaint.[2]

As will be explained below, the ALJ's decision impermissibly expands the rights established by the U.S. Supreme Court in its seminal *Weingarten* decision by interjecting an outside attorney into the regular workplace practice of conducting investigatory interviews of employee misconduct. With no basis in law, other than the inexplicable conclusion that an attorney who may have performed some services for a union is a "union agent," akin to a union business agent, the ALJ's conclusion fundamentally alters workplace investigatory interviews by turning them into the very type of adversarial proceedings that they are not intended to be. Significantly, Respondent never denied Poulos his right to have a union representative participate in the February 24, 2016 investigatory interview relating to his February 16th conduct that resulted in PAE receiving a customer complaint specifically naming Poulos. *The evidence in the record is undisputed that when the investigatory interview was ultimately conducted on February 24, 2016, Poulos was permitted two union officials, who were also officers of the Union, who asked questions at the appropriate times, consulted with Poulos, and participated to the full extent permitted by law.* As will be explained below, in concluding that PAE had denied those union representatives the right to fully participate in Poulos' investigatory

[2] PAE recognizes that the Board will accept the ALJ's credibility determinations unless those determinations conflict with well supported inferences drawn from other portions of the record or are "inherently unreasonable or self-contradictory." *See, Russell-Newman Manufacturing Co. v. NLRB*, 407 F.2d 247, 249 (5th Cir. 1969); *NLRB v Randall-Eastern Ambulance Service, Inc.*, 584 F2d 720, 730 (5th Cir. 1978). While PAE strongly disagrees with several of the ALJ's credibility determinations, especially her determinations relating to the credibility of Tom Fisco and James Rutledge, we do not believe any of the exceptions below are dependent on the Board's reversal of those erroneous credibility determinations.

interview, the ALJ completely ignored the Board's longstanding belief that an employer *may insist* on hearing the employee's own account of the matter under investigation. As the evidence in the record demonstrated, that is all PAE insisted on doing and otherwise fully permitted Poulos' union representatives to participate in the February 24, 2016 investigatory interview.

Moreover, the ALJ's conclusion that PAE issued a final written warning to Poulos in violation of both Sections 8(a)(1) and (3) is fundamentally flawed and inconsistent with the credible evidence in the record. The ALJ's discussion of this allegation ignores several key and undisputed facts, including, but not limited to, the following: the reason why PAE initiated its investigation into Poulos' conduct (the complaint and Corrective Action Request that PAE received from the U.S. Air Force) and PAE's articulated basis for issuing the final written warning. Because the ALJ failed to properly analyze this allegation, and because the undisputed evidence demonstrates that PAE issued the final written warning *not* because of Poulos' protected activities, but instead for his wholly unprotected conduct towards the customer representative, the ALJ's findings and conclusion on this allegation should be reversed.

Finally, the ALJ's conclusion that PAE violated Sections 8(a)(1) and (5) by "failing to offer to bargain with the Union for an accommodation of interests in response to the Union's request for" a copy of the classified complaint lodged against Poulos is not only inconsistent with the evidence offered at the Hearing, but goes beyond the allegations contained in the General Counsel's Complaint and, as the record demonstrates, is a moot point overtaken by subsequent events.

Because the ALJ's Decision regarding the above referenced issues is not based on a preponderance of the credible evidence, and because it is unsound as a matter of law, PAE files this Brief in support of its Exceptions. The National Labor Relations Board ("NLRB" or "the Board") should sustain Respondent's Exceptions and reverse the Administrative Law Judge's findings and conclusions of law as fully addressed in these Exceptions.

II. STATEMENT OF FACTS[3]

A. The Parties.

PAE is a limited liability company that provides services in the areas of global stability and development, infrastructure management solutions, and defense support services. PAE operates at the Nevada Test and Training Range and Nellis Air Force Base in Nevada (collectively "the Range"), where it provides security, firefighting, operations and maintenance services to its customer, the United States Air Force.

This matter was filed by the Board's General Counsel on behalf of the Security Police Association of Nevada ("SPAN" or the "Union") which filed multiple unfair labor practice charges with the NLRB alleging that PAE violated various provisions of the NLRA. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the bargaining representative for the following unit:

[3] Citations to pages of the ALJ's Decision are indicated by the reference "(ALJD at p. __)." Citations to pages of the transcript of the hearing in this case are indicated by the reference "(TR ____)." References to Exhibits introduced at the hearing are as follows: General Counsel's exhibits "(GC Exhibit)" and Respondent' Exhibits "(R Exhibit ___)."

> All full-time and regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended; excluding all office clerical employees, professional employees and supervisors, as defined in the Act, as amended.

John Poulos was the President of SPAN for the period relevant to the underlying unfair labor practices. Timothy Campbell ("Campbell") and Joshua Lujan ("Lujan") were both Vice Presidents of SPAN.

B. PAE Provides Security and Other Services to its Customer, the U.S. Air Force, at Several Highly Secure Locations in Nevada.

PAE's Range Support Services Group has a contract with the U.S. Air Force to provide security officers at the Nevada Test and Training Range (the "Range"), a vast area covering millions of acres in Nevada. The security officers working for PAE at the Range are represented by a local union, SPAN. Jack Costello, Security Manager, oversees security services for PAE and reports to Program Manager for the Range Support Services Group, Dennis Dresbach. [TR 24:23 -25:7, 204:12-22][4]

Pursuant to its contract with U.S. Air Force, PAE provides security at more than eight different highly secure locations on the Range. These security services include regular patrols over large areas of the Range, as well as security at various points of entrance to the Range. PAE is also responsible for conducting certain program security, which covers a number of "classified functions." The U.S. Air Force has representatives at various locations on the Range who oversee its relationship with PAE. Raymond

[4] Citations to the Transcript from the Hearing shall be cited as "TR [page:line]"; hearing exhibits introduced by Counsel for the General Counsel will be cited as "GC [exhibit]"; hearing exhibits introduced by counsel for the Respondent will be cited as "R [exhibit]."

Allen, Director of Security Forces, was PAE's main customer representative for the Air Force at the Tonopah Test Range. [TR 24:14 – 25:7; TR 26:11-15; 30:10-31:9]

PAE's contract with the U.S. Air Force is a cost plus fee award contract. Under this type of government contract, PAE is paid its allowable costs, which include standard costs for services performed. However, PAE is also given the opportunity to obtain an award fee that is based on the quality of PAE's performance in various areas, as determined by the government. As part of its evaluation, the government performs regular technical evaluations of each of the individual areas in which PAE performs. In addition, the government also evaluates PAE's overall program management. If an Air Force employee has a negative interaction with a PAE employee, that interaction could impact PAE's award fee. [TR 205:16-206:7; 212:21-213:2]

C. The U.S. Air Force Sent PAE a Complaint About Poulos and a Corrective Action Request Relating to an Incident in Which Poulos Questioned the Authority of an U.S. Air Force Director of Security.

In early February 2016, Thomas Andrew Fisco, a contract security major on the Range Support Services contract, learned that the Air Force had suspended the firearm privileges of two security officers who had been involved in off-duty Driving under the Influence (DUI) incidents. Fisco contacted Poulos to let him know what was going on and to inform him that Fisco was not sure how PAE was going to address the issue. Because Poulos was the Union President, Fisco wanted Poulos to know that the officers were not able to bear arms for the time being. [TR 95:18-96:18]

On February 16, 2016, Fisco was in his office having a casual conversation with Raymond Allen, a U.S. Air Force representative, when Poulos barged into Fisco's office.

At the time, Poulos was supposed to have been heading to a training that was starting shortly in a room down the hallway. Poulos placed his bag down, interrupted Fisco's conversation with Allen, and immediately told Allen that he needed to talk to him about the situation from last week. Allen responded that he had already discussed the issue with Poulos over the phone last week and that Allen had nothing to say on the issue. Significantly, at the time of this interaction, the issues relating to the two security officers had already been resolved. In response, Poulos rudely questioned Allen's authority, as a GS-13, to do what he had done with respect to the two security officers. Allen became agitated by Poulos' rude and condescending response to him. Allen then explained to Poulos that, as Director of Security, Allen was responsible for the safety of every individual in his work area and that he needed to determine whether the two individuals were capable of safely carrying weapons in light of their DUIs. Once again, Poulos questioned Allen as to whether, as a GS-13, he had the authority to prevent the security officers from bearing firearms. As Allen became more and more agitated, Fisco attempted to direct Poulos to go to the training that he was scheduled to attend. Poulos ignored Fisco's instructions and continued to engage Allen on the subject. Poulos finally left Fisco's office after Poulos 'supervisor came to the office and told Poulos that his absence was holding up the training. [TR 97:22 – 100:6; GC Ex. 1, Attachments A, B]

The very next morning, Costello ran into Raymond Allen while working on the Range. Allen immediately informed Costello about his interaction with Poulos on the previous day. Allen had already sent Costello an e-mail about the incident, but because Costello had been travelling on the Range, he had not yet seen the e-mail. Although

Costello was "flabbergasted" by Allen's description of his interaction with Poulos and believed that Poulos' conduct warranted some level of discipline, he still wanted to conduct an investigation to gather more information about what happened before reaching a conclusion. Therefore, following receipt of the complaint from Allen, Costello contacted security supervisor James Rutledge and directed Rutledge to conduct an inquiry into the incident. Costello selected Rutledge because he had significant experience in conducting these types of investigations. As part of the investigation, Costello wanted Rutledge to obtain a statement from Poulos because he thought it was important to obtain Poulos' side of the story. [TR 31:25-9; 33:6-23; 34:6-12]

As a result of Allen's complaint about his interaction with Poulos, the U.S. Air Force issued a Corrective Action Request ("CAR") that PAE received in February 2015. The CAR was sent by the Air Force's contracting officer to PAE and informed PAE that it had "a concern regarding interaction between Poulos and a Government customer, Ray Allen." In the CAR, the contracting officer asked PAE to take corrective action to address the appropriateness of Poulos' interaction with Allen. It was rare for PAE to receive a CAR from the Air Force that addressed conduct of a specific PAE employee. The CAR was designated by the U.S. Government as a "classified" document. PAE specifically requested that the Government declassify the document, but the Government refused to do so. [TR 208:5-209:4; 212:21 – 23; 209:5-14] As a result, PAE could not provide it to the Union or use it in this unfair labor practice proceeding.

When the Union requested that PAE produce Allen's complaint against Poulos, PAE informed the Union that it could not provide the original complaint because, in its

original form, the complaint was designated as a "classified" document by the U.S. Government. PAE did request that the document be declassified, but the Government denied PAE's request. Significantly, PAE provided the Union with an unclassified e-mail from Allen, as well as a written statement provided by Allen, prior to issuing any discipline to Poulos. The information contained in the two unclassified documents was very similar, in all material respects, to the information contained in the "classified" documents and described the same set of facts that PAE relied upon to discipline Poulos. [TR 36:14 – 37:9; 209:5-14]

D. Poulos Insisted on Bringing an Outside Attorney to his Investigatory Interview Despite the Availability of Several Union Officials.

James Rutledge contacted Poulos to set up an interview with him to obtain his statement regarding the February 16th incident involving Raymond Allen. Rutledge was an experienced investigator who had performed numerous investigations throughout his career. After the interview had been set up, Poulos called Costello and informed Costello that he wanted to bring Nathan Ring, an attorney with a private practice law firm, to the interview scheduled for the following day.[5] Costello told Poulos he could bring one of his Union representatives to the interview. When Poulos insisted that he wanted to bring an outside attorney, Costello told Poulos that Ring was not an appropriate option and again told Poulos that he could bring a Union representative. [TR 34:22-24; 35:14-21, 188:17 – 189:14]

[5] As the record of the Hearing reflects, Mr. Ring is employed by a Las Vegas-based private law firm (the Urban Law Firm) and served as counsel for the Union at this unfair labor practice hearing. [TR 2, 5]

On February 19, 2016, Poulos arrived at PAE's North Las Vegas office along with Nathan Ring for his interview with Rutledge. Costello, who was in the office lobby at the time, approached Poulos and reiterated to him that it was "inappropriate" to bring Ring to the meeting. At the same time, Costello reiterated to Poulos that he could bring "any member of the Union that [he] wish[ed] as [his] representative." PAE did not proceed with the interview that day. [TR 38:11 - 39:3-6]

Over the next few days, Poulos continued to insist that he be permitted to bring an outside attorney to the interview with him during an exchange of e-mails with PAE. On February 22, 2016, Poulos wrote Robert Williams and once again stated that he wanted to be represented by the outside attorney at the upcoming interview. After a series of e-mails exchanges between Poulos and Williams, in which Poulos made a number of baseless accusations against PAE, Williams wrote an e-mail to Poulos on the afternoon of February 22nd and provided Poulos with a list of nineteen Union officers and stewards. PAE rescheduled the interview for February 24, 2016, and told Poulos to select a Union representative from the list of nineteen Union officials provided to him. [TR 66:10 – 67:4; GC Ex. 7]

All of the following individuals attended the February 24th interview: James Rutledge, Rob Williams, Anthony Marvez, John Poulos, Timothy Campbell, and Joshua Lujan. Campbell and Lujan – who were both Vice Presidents of SPAN – attended the

meeting as SPAN representatives.[6] Rutledge started the meeting by thanking everyone for coming and explaining the reason for the meeting, which was to gather information relating to a complaint made by Raymond Allen against Poulos. Rutledge explained that he wanted to get a statement from Poulos regarding the incident. One of the two Union representatives then asked for a copy of the complaint made by the U.S. Air Force. In response, both Rob Williams and Anthony Marvez said that they could not provide the complaint because it was a "classified," which led to a heated discussion between the parties. In response, Rutledge raised his hands up and told everyone in the room that that they needed to "quit talking." Rutledge explained that he was running the inquiry and, therefore, "everything comes through him." [TR 192:8 – 194:2]

Rutledge then reiterated his request that Poulos prepare a written statement regarding the February 16th incident. As Poulos was about to begin the process, Campbell asked Rutledge if he could ask Williams a question. Rutledge responded by asking if the question had "anything to do with this event" and Campbell said that it did. Therefore, Rutledge told Campbell that he could not ask the question in front of Poulos, because he did not want the question to influence Poulos' account of what happened. Campbell then left the room with one of the members of management to ask his question. Rutledge then asked Poulos a series of questions to which Poulos prepared written responses. Once Poulos had provided written responses to all of Rutledge's questions,

[6] Poulos testified that both Lujan and Campbell had served as Union representatives at other investigatory interviews conducted by PAE involving other SPAN members. [TR 142:18 – 143:9]

Rutledge took a break to give Poulos the opportunity to review his responses and to confer in private with his two Union representatives. [TR 194:3 – 197:2]

After returning from the break, Rutledge explained to the group that he was now going to conduct a question-and-answer session with Poulos. He specifically told Lujan and Campbell that they were welcome to participate and that they could "chime in" if they had any questions. During the question-and-answer session of the interview, Rutledge read the questions out loud that he prepared prior to the meeting. As he did this, Lujan and Campbell asked occasional questions seeking clarification on Rutledge's questions. After he asked the question, Rutledge handed the document over to Poulos to provide a written answer. After Poulos wrote his answer, Rutledge read the answer out loud so everyone could hear Poulos' response. During the process, Lujan and Campbell asked multiple questions. Following the question and answer session, Rutledge let everyone review the written document and had Williams make a copy of the document for Poulos and his representatives. At the end of the meeting, Lujan asked Rutledge what would happen next. Rutledge explained that he would complete a report and turn it in. [TR 197:2 – 200:5, GC Ex. 9(a)]

E. PAE Issued Poulos a Final Written Warning for His Questioning of Raymond Allen's Authority During the February 16, 2016 Encounter, Which Had Resulted in a Complaint from the U.S. Air Force and the Issuance of a Corrective Action Report.

After James Rutledge completed his investigation into the February 16, 2016 incident, PAE convened its Disciplinary Review Board ("DRB") to consider whether Poulos' conduct, which resulted in a complaint and Corrective Action Report from the

Air Force, warranted discipline. The DRB is made up of several members of PAE's management team in a variety of different disciplines. The very purpose of the DRB is to evaluate all of the relevant facts before making a determination regarding possible employee discipline. [TR 207:1-208:2]

The Disciplinary Review Board made the decision to discipline Poulos based on the complaint it received from the Air Force and the potential impact the complaint could have on PAE's relationship with its customer. The PAE managers involved in the decision believed, based upon their discussions with Allen and his subsequent complaint, that Allen was deeply offended by Poulos' conduct towards him during their February 16, 2016 interaction. The subsequent issuance of the CAR by PAE's customer, the U.S. Air Force, further reinforced PAE's concern regarding Poulos' conduct, and the impact of that conduct on PAE's relationship with its customer. The evidence on this point is undisputed:

Jack Costello

Q: The decision to discipline was based on Mr. Allen's complaint?

A: Mr. Allen's Complaint.

***

Q: Did you get the impression from this document that Mr. Allen was offended by Mr. Poulos' behavior?

A: I think it's very clear in there that he was.

Q: This was a personal offense, correct?

A: No, it was a professional.

[TR 42:6-8, 46:26 – 47:4]

Dennis Dresbach

Q: And ultimately, did you approve the discipline issued to Mr. Poulos?

A: Yes.

Q: And why did you do that?

A: Well, we had two people that were witness to the comments that were made and they were relatively consistent in saying that there was a customer that was addressed in a condescending fashion. And the – I and the board felt that was true.

[TR 211:24 – 212:6] On March 24, 2016, PAE issued Poulos a final written warning that stated the following:

> On February 16, 2016, you (John Poulos) questioned a Customer official on actions taken on an incident and challenged the Customer's authority to execute actions taken. Your conduct and behavior was improper and disrespectful towards the Customer. After this occurrence, the Company received a complaint from the Customer regarding your behavior and conduct. This exhibition of conduct and behavior is unacceptable and will not be tolerated. Your actions and behaviors towards the Customer has had a negative impact on the Company, as expressed in communications, and the potential negative grading of the Company's performance…

[TR GC Ex. 4]

Finally, at the customer's request, Costello issued a memorandum to SPAN officers on March 24, 2016, which states in relevant part:

> 1. The Customer has stated that you or any other officer of SPAN refrain directly contacting any Customer officials on any matters that involves concerns with employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA between the Company and SPAN. Any issues or concerns regarding the

> CBA are to be brought to the proper member of the chain of command of the Company.

[GC Ex. 5] The memorandum also stated:

> *Nothing in this memo prevents you from filing a charge with or participating, testifying, or assisting in any investigation, hearing, whistleblower proceeding, or other proceeding before any federal, state, or local government agency (e.g. EEOC, NLRB, OSHA, SEC, etc.), nor does anything in this memo preclude, prohibit, or otherwise limit, in any way, your rights and abilities to contact, communicate with, report matters to, or otherwise participate in any whistleblower program administered by any such agencies.*

[GC Ex. 5 (emphasis in original)]

III. ARGUMENT

A. The ALJ Erred in Finding that the Union's Outside Counsel, Nathan Ring, Was a "Union Representative" for Purposes of the Rights Provided under *Weingarten* (Exceptions 9 – 18).

Significantly, with respect to the General Counsel's allegation that PAE violated Section 8(a)(1) by denying Poulos a union representative of his choosing for an investigatory interview on four separate occasions, there are few facts in dispute. As noted in the ALJ's Decision, several of the facts critical to the ALJ's determination are undisputed, including all of the following:

- After its receipt of a complaint from Raymond Allen of the U.S. Air Force regarding his interaction with Poulos on or about February 16, 2016, PAE made the decision to conduct an investigatory interview with Poulos to gather additional information regarding the incident, including to obtain Poulos' statement of what occurred on the date of the incident; [ALJD at pp. 4-6]

- Prior to the interview, PAE believed that some form of discipline was warranted, but wanted to gather additional information before determining the level of discipline to be imposed [ALJD at p .6];
- That Poulos could reasonably believe that the investigatory interview may result in discipline [ALJD at p. 15];
- During a telephone conversation between Costello and Poulos on February 18, 2016, Costello advised Poulos that PAE needed him to provide a statement. Poulos informed Costello that he intended to bring Nathan Ring, an attorney in private practice, with him to the interview. In response, Costello told Poulos that Ring was not appropriate and he could bring a "union representative." [ALJD at p. 7]
- On February 19, 2016, Poulos arrived at PAE's North Las Vegas facility with Ring. Costello reiterated to Poulos that Ring was not appropriate to serve as a union representative but Poulos could bring *any* member of the Union as his representative. Poulos and Ring left the facility. [ALJD at p. 7]
- Later on February 19, 2016, Poulos had an email exchange with Williams in which Williams told Poulos to set a specific time for the interview and to get a representative. Poulos wrote back informing Williams that the Union had designated counsel as his representative. Williams replied that he could not bring "legal counsel," setting a time for the interview, and providing Poulos a list of union representatives from which he could choose. [ALJD at p. 7]

- Poulos attended the scheduled investigatory interview on February 24, 2016 with the two Vice Presidents of the Union, Campbell and Lujan, serving as his *Weingarten* representatives. [ALJD at pp. 8-9]

As these undisputed facts demonstrate, there is no question that PAE acknowledged that Poulos was entitled to a "union representative" at the request investigatory interview or that PAE repeatedly instructed Poulos to bring a "union representative" to the interview. The only issue in dispute was whether outside attorney, Nathan Ring, may serve as a "union representative" for purposes of the U.S. Supreme Court's *Weingarten* requirement. For the reasons, explained below, the ALJ erred in concluding that Ring could serve as a union representative under *Weingarten.*

In 1975, the United States Supreme Court issued its seminal decision on the rights of unionized employees to union representation during investigatory interviews in the workplace in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, (1975). In *Weingarten,* the Supreme Court held that employees may refuse to submit to an interview by employer representatives, without a union representative being present, if the employee reasonably believes that the interview may result in discipline. In reaching this conclusion, however, the Court made it clear that (1) the right arises "only in situation where the employee requests representation;" (2) the employee's right to request representation "is limited to situations where the employee reasonably believes the investigation will result in disciplinary action;" (3) exercise of the right may not interfere with legitimate employer prerogatives; and (4) the employer may carry on its inquiry without interviewing the employee if it so chooses. *Id.* The Supreme Court noted that the unionized employee's

right to a union representative for an investigatory interview "inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection." *Id.* at 256.

In the forty plus years since the Supreme Court's decision in *Weingarten,* the Board and the Federal Appellate Courts have issued thousands of decisions interpreting the nature and scope of the rights established by the Court in *Weingarten.* As these numerous decisions demonstrate, an employee's right to union representation under *Weingarten* has limits and it is the responsibility of the Board (and Appellate Courts) to appropriately delineate those limits to balance the employee's right to union representation against the employer's right to investigate employee misconduct in the workplace. These decisions have addressed everything from what constitutes an "investigatory interview" to the role a union representative is permitted to play during an investigatory interview. Incredibly, despite the large number of post-*Weingarten* decisions, there is not a single decision addressing whether an attorney – who may have *some* relationship to the Union – can properly serve as a "union representative" at an investigatory interview under *Weingarten.* For the reasons explained below, the ALJ's impermissible attempt to expand *Weingarten* to permit a Union to bring legal counsel into the workplace to serve as a "union representative" must be rejected.

While there may not be a single case directly on point, there are post-*Weingarten* decisions that have recognized that there are limits as to who can serve as "union representative" under *Weingarten*. Although the ALJ attempted to distinguish the decision in *Consolidated Casinos Corp.,* 266 NLRB 988 (1983), the Board in that case adopted an Administrative Law Judge's decision concluding that an employee's request for the presence of an attorney during an investigatory interview did not invoke

Weingarten rights. In reaching this conclusion, the ALJ stated: "I reject the proposition that an employee may request the presence of *any* person, including his personal lawyer, and thus invoke Weingarten rights." *Id* at 1008 (emphasis added). *See also*, *Montgomery Ward & Co.*, 269 NLRB 904, 911 (1984) (concluding that when the employee asked a supervisor whether "she needed a lawyer, she did not thereby make a request within the meaning of the Weingarten rule.")

In concluding that PAE violated Section 8(a)(1) by denying Poulos his right to the representative of his choice, the ALJ made the unprecedented (and unsupported) conclusion that Ring, an attorney in private practice who had represented the Union in the past, was "an agent of the Union" and therefore, could serve as "union representative" for purposes of *Weingarten*. [ALJD at pp. 15-16] In doing so, the ALJ relied entirely on the Board's decision in *Public Service Company of New Mexico*, 360 NLRB No. 45 (2014). In *Public Service Co.*, the General Counsel alleged that the employer had violated Section 8(a)(1) when it denied the employee (Cox) his choice of Tafoya, the union business agent, to serve as his "union representative" at an investigatory interview. Significantly, the Board's decision does not suggest that either the ALJ or the Board addressed the relevant question of whether the union business agent was an appropriate "union representative" for purposes of *Weingarten.* Nonetheless, PAE disagrees with the ALJ's conclusion that a private practice attorney who has performed some level of work for the Union is analogous to a union business agent that is employed by the union. Among other differences (addressed below), the union business agent in the *Public Service Co.* was responsible for directly overseeing union business throughout the state of New Mexico and presumably had a much larger and more regular role in the union-

employer relationship than Ring, an associate at the The Urban Law Firm, which has many clients in addition to the Union.[7]

In finding that Ring was "an agent of the Union" who could serve as a "union representative" under *Weingarten,* the ALJ failed to recognize the difficult situation created by interjecting attorneys in the regular workplace practice of conducting investigatory interviews. First, by their very nature, investigatory interviews are informal meetings intended to allow employers to quickly gather information necessary to determine whether employee misconduct occurred and, if so, whether discipline is warranted. The fundamental nature of these meetings will change if a union is permitted to call upon its attorney to serve as a "union representative" every time an employee is asked to participate in an investigatory interview. Additionally, in the presence of a legally-trained union attorney, employers will almost certainly feel compelled to have their own counsel present and available to participate in these investigatory interviews. This will not only significantly increase the cost of conducting such investigatory interviews, but may deter employers from obtaining the information they need to make an informed decision regarding employee misconduct.

Moreover, the ALJ's decision creates a nearly unworkable standard in which an employer will be forced to determine whether an employee's designated attorney is a personal attorney, who may *not* serve as a "union representative," or a union attorney who may serve. While the ALJ concluded that PAE knew Ring was the Union's attorney, the record was devoid of any evidence regarding the history of Ring's involvement either with the Union or the Union's relationship with PAE. What level of

[7] *See*, http: //www.theurbanlawfirm.com.

involvement with the Union will be sufficient to cross the invisible boundary between being an employee's personal attorney to being a union attorney? Will the attorney have to be an in-house union attorney, been involved in past union grievances with the employer or have participated in the collective-bargaining negotiations? Significantly, this determination will be left to supervisors and managers who will be tasked with making these decisions on the fly. Of course, as the Board has made clear, the consequences of denying a unionized employee his or her *Weingarten* rights is significant and will lead to potential unfair labor practice charges with the risk that the discipline stemming from the "unlawful" investigatory interview is invalidated. These consequences are much too high to be left to a game of chance.

There is simply no legal basis for the ALJ's conclusion that an outside attorney – even one who has represented the union in the past or who may have had some level of involvement in the union-employer relationship – is a "union representative" for the purposes of *Weingarten*. The Union should not be permitted to interject attorneys into the seemingly regular workplace practice of conducting investigatory interviews. The ALJ erred in concluding that PAE violated Section 8(a)(1) by denying Poulos' choice of Nathan Ring as his "union representative" at the investigatory interview and the Board should reverse this conclusion.

B. The ALJ Erred in Concluding that PAE Violated Section 8(a)(1) by Refusing to Allow an Union Representative to Participate and Assist an Employee During Portions of the February 24, 2016 Investigatory Interview (Exceptions 19-25).

In her decision, the ALJ found that PAE violated Section 8(a)(1) of the NLRA "when Rutledge required Poulos' union representative to remain silent during certain

portions of the investigatory interview thereby depriving Poulos of useful representation." [ALJD at p. 17] According to the ALJ, "although Rutledge initially permitted a few question, he then told all participants that he would not allow any further discussions and all questions needed to come through him." [ALJD at p. 16] Moreover, the ALJ also based her decision on her finding that "Rutledge would not permit any other questions by anyone…while Poulos prepared his statement" or during his "question-and-answer session." [*Id.*] Significantly, the ALJ acknowledged that one of the union representatives left with a PAE manager at some point to ask his question [ALJD at p. 9:14-15], that Poulos was allowed to consult with his union representatives after providing the written statement[8] [ALJD at p. 10:26 – 27], and that the union representatives were allowed to ask questions after the question-and-answer session [ALJD at p. 10:32-33, fn 19]. These undisputed facts fatally undercut the ALJ's finding that PAE violated Section 8 (a) (1) of the NLRA.

In concluding that Rutledge's conduct during the February 24 investigatory interview was unlawful, the ALJ relied entirely on the Board's decision in *Lockheed Martin Astronautics*, 330 NLRB 422 (2000). However, the facts in that case are clearly distinguishable. In *Lockheed Martin*, at the start of the meeting, the union representative asked the management official (Duca) conducting the interview what the meeting was about and Duca quickly told him "to shut up as she was asking the questions." [*Id.* at 428] Even though the union representative did subsequently ask questions, the General

[8] Although the ALJ noted that the union representatives consulted with Poulos "without the statement" [ALJD at p. 10:26-27], the uncontroverted testimony in the record indicates that the union representatives were given the opportunity to review the statement after Poulos wrote it and then they also had the opportunity to consult with Poulos in private about the statement. [TR 196-197] Moreover, the Union was also given a copy of the statement. [TR 199]

Counsel argued, and the Board subsequently found, that Duca's statement telling the union representative to "shut up" "was an improper attempt to limit his role in the interview." [*Id.* at 429] In the instant case, even though the ALJ discredited portions of Rutledge's testimony concerning the investigatory interview, there was no evidence that Rutledge attempted to completely silence Poulos' union representatives in the same manner that Duca did in *Lockheed Martin.* As the ALJ herself found, "Rutledge initially permitted a few questions" before telling "*all participants* that he would not allow further discussion and all questions needed to come through him." [ALJD at p. 16:26-27 (emphasis added)] Even accepting the ALJ's erroneous credibility determinations regarding Rutledge, his conduct was far from the conduct attributed to the interviewer in *Lockheed Martin*.

Moreover, the evidence adduced at the Hearing clearly demonstrated that Rutledge only prohibited questions while Poulos was making his written statement and during the question-and-answer session, *so that he could obtain Poulos' own account of what occurred*. Notably, the ALJ did not discredit the specific portion of Rutledge's testimony explaining why he wanted to get Poulos' own account of occurred without any influence from the other individuals in the room. [TR 194:3-8] However, in her decision, the ALJ conspicuously ignored the *Weingarten* Court's recognition that an employer "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." *Weingarten*, 420 U.S. at 258 (citation omitted). This is an employer right that has consistently been upheld in subsequent cases. For example, in *Southwestern Bell Tel. Co. v. NLRB*, the Fifth Circuit Court of Appeals refused to enforce a Board order that the employer violated the *Weingarten* rights of its employee when the

supervisor told the union representative that he wanted the employee being interviewed to answer the questions himself and then if the union representative had any questions, then he could ask the questions after the employee was done. 667 F.2d 470 (5th Cir. 1982). According to the Fifth Circuit:

> The limitations in the instant case were within the perimeters set forth by the Supreme Court in *Weingarten* and did not interfere with McQuiller's ability to assist Gottschalk, to clarify facts, or to bring additional relevant facts to Hubbard's attention

Id. Similarly, the restrictions put in place by Rutledge during the February 24 investigatory interview were consistent with the restrictions upheld in *Southwestern Bell* and the rights recognized by the Court in *Weingarten*.

Once again, even if we were to accept the ALJ's credibility determinations, there is simply no basis for her conclusion that Rutledge "stifled Lujan and Campbell's ability to represent Poulos" or that he only allowed them to speak under terms in which "they could not fulfill their duties to participate and assist Poulos fully during this meeting." [ALJD at pp. 16-17] As noted above, Lujan and Campbell asked questions at the beginning of the interview, were permitted to consult with Poulos alone after he wrote his written statement, and were allowed to ask clarifying questions after the question-and-answer session. Moreover, the uncontroverted evidence in the record demonstrates that that Campbell asked a question regarding the complaint made against Poulos prior to Poulos' providing the written statement and that Lujan asked "several questions" at other times during the interview. [TR 174:7 - 17]

For the rasons explained above, the ALJ erred in finding that PAE violated Section 8(a)(1) through Rutledge's conduct during the February 24, 2016 investigatory interview.[9]

C. The Board Should Reverse the ALJ's Finding that Rutledge Unlawfully Interrogated Poulos During the February 24, 2016 Investigatory Interview in Violation of Section 8(a)(1) of the Act (Exceptions 50-53).

In her Decision, the ALJ found that, "under the totality of the circumstances, Respondent unlawfully interrogated Poulos" when Rutledge interviewed him on February 24, 2016 about his interaction with U.S. Air Force representative Raymond Allen. In reaching this conclusion, the ALJ stated that "[s]imply because Allen complained that Poulos' conduct during that meeting was 'bullying' and 'insubordination' does not permit Respondent to stymie Poulos' Section rights to represent his constituents." [ALJD at p. 22] For the reasons explained below, we believe that the ALJ improperly analyzed the General Counsel's interrogation allegation and the Board should reverse her findings and conclusions relating to this allegation.

While the ALJ cites to the Board's decision in *Fresenius USA Mfg. Inc.*, 362 NLRB No. 1, slip op. at 1 (2015), she failed to recognize that the Board's earlier decision in the matter addressed a similar interrogation allegation. In *Fresenius USA Mfg., Inc.* 358 NLRB No. 138 (2012), the employer conducted an investigation after receiving complaints about inappropriate handwritten comments found on union newsletters placed throughout the facility. After receiving complaints from several female employees that

[9] For the very same reasons explained in Section III.B, the ALJ erred in finding Rutledge promulgated a rule not permitting union representatives to participate in any defense or ask any questions during an investigatory interview and only permitting them to speak upon notification of the employer or after completion of the investigatory interview [Exceptions 54-56].

the comments were "vulgar, threatening, and offensive," the employer launched an investigation that included the questioning of the alleged discriminatee (Grosso). There was little question that Grosso's placement of the comments on the union literature was protected under the Act. In finding that Fresenius' questioning of Grosso during the investigation did not violate the Act, the Board noted that, "as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, *even if that conduct took place during the employees' exercise of Section 7 rights.*" *Id.* Moreover, the Board noted that the questioning of Grosso occurred during the Fresenius' "legitimate investigation of employees' complaints about the newsletter comments" and Fresenius "never asked Grosso about his union views generally or any of his other union activity." *Id.* Similarly, in *Bridgestone Firestone South Carolina,* 250 NLRB 526 (2007), the Board found that the employer lawfully questioned an employee – who was a known union supporter – about alleged vulgar comments and other misconduct made in connection with union activity. In doing so, the Board stated:

> The Respondent had a legitimate basis for investigating [the employee's] misconduct, and its investigation was entirely consistent with its policy…Furthermore, the Respondent made reasonable efforts to circumscribe its question to avoid unnecessarily prying into [the employee's] union views, and the limitations on its inquiry were clearly communicated to [him].

Id. at 528-29.

In the instant case, the ALJ appears to have simply concluded that, because Poulos was engaging in conduct in connection with his role as Union President, which would be protected under the Act, any employer questioning relating to that conduct would

necessarily be unlawful interrogation. In reaching that conclusion, the ALJ failed to consider what caused PAE to investigate Poulos' conduct or the focus and scope of Rutledge's questioning. As the Board has regularly held, in determining whether an interrogation is unlawful it must evaluate "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with the rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985). First, the evidence in the record establishes that Costello decided to initiate the investigation after talking to U.S. Air Force representative Raymond Allen about his interaction with Poulos and receiving Allen's complaint. [TR 31:25-9; 33:6-23; 34:6-12] Therefore, it is undisputed that the reason for the investigatory interview was not to explore Poulos' union activities (which were widely known), but to specifically get Poulos' side of the story in response to Allen's complaint about their interaction. [*Id.*] *Addressing a customer's complaint is certainly a legitimate basis for investigating employee conduct.* Second, the evidence further demonstrates that Rutledge's questioning of Poulos during the February 24, 2016 was completely limited to Poulos' interaction with Allen on February 16, 2016. [TR 187-200] There has been no suggestion that Rutledge questioned Poulos on any subject other than his February 16, 2016 interaction with Allen – the interaction that formed the basis of Allen's complaint.

In light of the reason for the investigatory interview (the customer complaint) and the limited scope of Rutledge's questioning, there is simply no basis for the ALJ's finding that PAE engaged in unlawful interrogation of Poulos on February 24, 2016. The ALJ's finding was based on her unsupported belief that *any* questioning of an employee

engaged in conduct protected by the Act was unlawful. The Board should reverse the ALJ's conclusion that PAE unlawfully interrogated Poulos on February 24.

D. The ALJ Erred in Concluding that PAE Discriminated Against Poulos When It Issued Him the March 24, 2016 Final Written Warning (Exceptions 26-49).

In her Decision, the ALJ concluded that PAE violated Sections 8(a)(1) and (3) when it issued Poulos a final written warning for Poulos' conduct on February 16, 2016.[10] In reaching this conclusion, the ALJ overlooked critical evidence that resulted in the final written warning: (1) that PAE's client, the U.S. Air Force, sent PAE a complaint about Poulos' interaction with Raymond Allen on February 16, 2016 and subsequently issued the CAR relating to that same conduct; and (2) the articulated reason for the final written warning. In her analysis of the final written warning, the ALJ focuses entirely on the fact that Poulos was engaging in union activities on February 16, 2016. By doing so, she fails to recognize that there was no evidence establishing that his union activities motivated PAE's decision to issue the final written warning. To the contrary, the evidence clearly established that the decision to issue the final written warning was based on the manner in which he questioned the authority of the customer representative, Raymond Allen – conduct that was *not* protected by the NLRA. As more fully explained below, the ALJ erred in concluding that PAE violated Sections 8(a)(1) and (3) of the Act by issuing Poulos the March 24, 2016 final written warning.

Significantly, in the Decision, the ALJ applies the analytical framework established by the Board in *Burnup & Sims, Inc.* 256 NLRB 965 (1981), to the General Counsel's

[10] The ALJ concluded that PAE did not discipline Poulos for invoking his *Weingarten* rights in violation of Section 8(a)(1) and dismissed this allegation. PAE does not file an exception relating to this finding.

allegation regarding the final written warning. [ALJD at p. 17] According to the ALJ, the *Burnup & Sims* framework was appropriate because it applies where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity. [*Id. citing Burnup & Sims* at 976] Interestingly, the ALJ applied this framework in the face of the General Counsel's argument that the analytical frameworks from *Wright Line* and *Atlantic Steel* were more appropriate. *Wright Line*, 251 NLRB 1083 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982); *Atlantic Steel*, 245 NLRB 814, 816-817 (1979). Regardless of which framework is applied by the Board, "the pertinent question remains "whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005). As will be explained below, the ALJ incorrectly applied the *Atlantic Steel* factors in concluding that Poulos' conduct on February 16, 2016 was entitled to the protections of the Act.

1. PAE Did Not Issue the Final Written Warning Because Poulos Engaged in Conduct Protected By the Act.

Significantly, the content of that final written warning made it clear that PAE was disciplining Poulos not because he was engaging union activity, but instead because he questioned the authority of one of PAE's customer representatives, which resulted in a complaint to PAE and the subsequent Corrective Action Report. Specifically, the March 24, 2016 final written warning stated:

> On February 16, 2016, you (John Poulos) questioned a Customer official on actions taken on an incident and challenged the Customer's authority to execute actions taken. Your conduct and behavior was improper and disrespectful towards the Customer. After this occurrence, the Company received a complaint from the Customer regarding your behavior and conduct. This exhibition of conduct and behavior is unacceptable and will not be tolerated. Your actions and behaviors towards the Customer has had

> a negative impact on the Company, as expressed in communications, and the potential negative grading of the Company's performance…

[TR GC Ex. 4] The ALJ appears to presume that Poulos was engaging in "union activity" throughout his February 16, 2016 interaction with Raymond Allen simply because he was the Union President. However, as the ALJ recognized in her decision, prior to his February 16, 2016 interaction with Allen, the United States Government had *already* decided to reinstate the two security officers' right to bear arms, so there was no outstanding issues relating to the terms and conditions of the two security officers' employment with PAE which would have an appropriate concern of the Union. [ALJD at p. 5] Instead, the evidence in the record shows that Poulos engaged Allen simply to question Allen's authority to revoke security officers' right to bear firearms.

The questioning of Allen's authority to perform his job was neither union activity nor protected, concerted activities under Section 7. Therefore, the ALJ erred in concluding that the final written warning, which only addressed the portion of the February 16, 2016 interaction during which Poulos questioned Allen's authority to do his job, could have possibility been for an unlawful reason.

2. Even if Poulos' Conduct on February 16, 2016 Was Protected, The Conduct Lost Its Protections.

Even if the ALJ was correct in concluding that Poulos' conduct towards Raymond Allen on February 16, 2016 was protected under the Act that conduct would have lost its protections because of the manner in which Poulos engaged during his interaction with Allen. Even if conduct falls within the ambit of Section 7's protections, the Board and courts have repeatedly recognized that, "an employee may engage in conduct…which is

so opprobrious as to be unprotected." *Hawaiian Haulting Serv., Ltd.*, 219 NLRB 756, 766 (1975). To decide whether the employee's conduct was so offensive so as to lose protection under the Act, the Board considers the following *Atlantic Steel* factors:

(1) The place of the discussion;

(2) The subject matter of the discussion;

(3) The nature of the employee's outburst; and

(4) Whether the outburst was, in any way provoked by an employer's unfair labor practice.

Atlantic Steel, 245 NLRB at 814 (1979). Although the ALJ analyzed Poulos' conduct according to the factors established by the Board *Atlantic Steel* in her decision, she incredibly failed to recognize one critical fact that provides necessary context: that Poulos' conduct *was directed towards a customer* who subsequently complained about the conduct. Therefore, the ALJ's application of the *Atlantic Steel* facts was fundamentally flawed and should be rejected.

a. **The place of the discussion**.

The February 16, 2016 incident occurred in the office of PAE employee Tom Fisco. However, what the ALJ failed to recognize, is that Fisco's office (like nearly all of PAE's facilities) is located at a site shared with its customer, the U.S. Air Force. Therefore, there was a heightened risk that Poulos' conduct would disrupt PAE's relationship with its customer, which it ultimately did. Significantly, as even the ALJ recognized, at least one other individual entered the office after "hearing raised voices" and Poulos admitted "that employees asked him what had occurred after hearing raised

voices from Fisco's office." [ALJD at pp. 18-19] Most importantly, however, is the fact that Poulos' conduct offended one very critical constituent: PAE's customer representative. Because of the fact that the discussion occurred between Poulos and Raymond Allen, the customer representative, this factor should strongly militate against protection of Poulos' conduct.

b. **The subject matter of the discussion**.

This is one of several instances in which the ALJ's analysis simply fell short. The ALJ concluded that, because Poulos' conversation with Allen and Fisco "occurred during a discussion of the security officers' disciplinary letter," it weighs in favor of protection. However, the fact that Poulos may have initially started his discussion with Fisco regarding past discipline issued to two security officers (discipline that had since been resolved) is not the relevant issue. As the final written warning makes clear, Poulos was not disciplined for discussing the past discipline of these two security officers with Allen, but rather for directly questioning the authority of Allen to revoke a security officer's right to bear arms. Nor does the final written warning contain any reference to the fact that Poulos previously raised the issue with Allen. This is because it only became an issue when Poulos rudely questioned Allen's authority to do his job. This type of conduct – particularly in a military environment such as the U.S. Air Force – should not be protected.

c. **The nature of the employee's outburst**.

There can be no question that the manner in which Poulos questioned Allen's authority was inappropriate. Although the ALJ discredited much of Fisco's testimony regarding the February 16, 2016 incident and credited Poulos' testimony that he did not

tell Allen "that a GS-13 should keep his nose out of this,"[11] the ALJ did recognize that Poulos likely made some statement to Allen concerning his "GS status" and that Poulos did admit that he told Allen that he did not have certain authority. [ALJD at pp. 13 – 14] Despite these acknowledgments and the fact that, in his unclassified complaint to PAE, Allen stated that he found Poulos' behavior towards him to be "offensive and confrontational," the ALJ still found that this factor favored protection. In reaching this conclusion, the ALJ stated that "[a]t worst, Poulos' statement can be seen as nondeferential to Allen…" [ALJD at p. 19] However, Allen clearly viewed the conduct as more than just "nondeferential," as he felt compelled to complain about the conduct to PAE and he described the conduct as "offensive and confrontational" to him, and PAE's customer certainly thought Poulos' conduct was inappropriate when it issued the CAR to PAE concerning the incident. [GC Ex. 4][12]

d. **Whether the outburst was, in any way provoked by an employer's unfair labor practice**.

The ALJ correctly concluded that there was no evidence that Poulos' conduct on February 16, 2016 was provoked by an unfair labor practice committed by PAE. In fact, there was no evidence in the record to demonstrate that PAE had committed any previous

[11] Oddly, the ALJ discredited Fisco's testimony on this point even though it was nearly identical to Allen's language in his unclassified complaint to PAE. In the unclassified complaint, Allen stated that Poulos said "something to the effect that as a GS-13 that I should 'keep my nose out of this.'" [ALJD at p. 5; GC Ex. 3]

[12] Not surprisingly, neither of the two cases in which the ALJ relies on to conclude that Poulos' conduct was "was well within the bounds of conduct which has been sanctioned by the Board" involved employee conduct directed towards a customer. *See Severance Tool Industries,* 301 NLRB 1166 (1991); *Noble Metal Processing, Inc.* 346 NLRB 795 (2006).

unfair labor practices or had demonstrated any unlawful animus towards Poulos' work as the Union President.

For these reasons, the ALJ erred in applying the *Atlantic Steel* factors in her analysis of whether Poulos' conduct towards Allen – which served as the basis for PAE's decision to issue him the final written warning – lost its protection under the Act. If the Board properly analyzes these factors based on the ALJ's credited evidence, it must conclude that the ALJ erred in not finding that Poulos' conduct on February 16, 2016 (if ever protected under the Act) lost those protections.

3. The General Counsel's Discrimination Allegation Also Fails under *Wright Line*.

Even if the Board were to conclude that the burden-shifting framework under *Wright Line* was the proper test to be applied to the General Counsel's allegation regarding the final written warning, it could still not find that PAE violated the Act. Under *Wright Line*, the General Counsel has the burden to prove, by a preponderance of the evidence, that the employee's union sympathies or activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). For the reasons explained above, Poulos' conduct lost the protections of Section 7 because it was so flagrant or egregious as to remove the conduct from the protections of the NLRA. Therefore, the General Counsel has failed to establish a *prima facie* case of discrimination under *Wright Line.*

Nonetheless, even if the General Counsel had demonstrated that Poulos engaged in conduct protected under the Act, the General Counsel failed to establish that this protected conduct was the substantial or motivating factor for the final written warning or any other evidence of animus. Nor did the General Counsel offer any other probative

evidence of any anti-union animus by PAE. Significantly, Poulos had been the President of the Union for over a year when the February 2016 incident occurred. And yet there is no evidence that PAE had previously disciplined him for his union activities. [TR 103] And while the ALJ found the timing of the final written warning "suspect" [ALJD at p. 20], the testimony clearly established the timing made sense considering the initial decision to discipline Poulos came after PAE's receipt from Raymond Allen, the U.S. Air Force, of his customer complaint and the subsequent Corrective Action Request from the Air Force's contracting officer.[13]

Whether the Board applies the analytical framework from *Burnup & Sims*, *Atlantic Steel* or *Wright Line*, the result will be the same. The ALJ erred in finding that Respondent issued the final written warning to Poulos in violation of Sections 8(a)(1) and (a)(3).

E. <u>The ALJ Erred in Finding that PAE Maintained an Unlawful Rule When It Issued a March 24, 2016 to SPAN Officers (Exceptions 57-62)</u>.

The ALJ found that PAE maintained an unlawful rule when Costello issued a March 24, 2016 to all SPAN officers, which provided in relevant part:

[13] In deciding that the General Counsel had met its burden under *Wright Line*, the ALJ noted that the packet prepared for the Disciplinary Review Board (DRB) included a February 10 memorandum from Robert Williams detailing other union activities in which Poulos had engaged. According to the ALJ, this was further evidence of PAE's anti-union animus. However, this conclusion ignores the timing of the investigation, which came directly on the heels of PAE's receipt of the complaint from Raymond Allen. Moreover, although the memorandum was in the packet to the DRB, the General Counsel elicited no testimony from any of the individuals involved in the DRB that the memorandum was considered in deciding to issue Poulos the March 24, 2016 final written warning. To the contrary, the only evidence in the record relating to the memorandum was the testimony of Dennis Dresbach, the Program Manager, in which he specifically testified that the DRB did not consider Williams' February 10, 2016 memorandum and did not discuss the issues raised in that memorandum. [ALJD at p. 20]

1. The Customer has stated that you or any other officer of SPAN refrain directly contacting any Customer officials on any matters that involves concerns with employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA between the Company and SPAN. Any issues or concerns regarding the CBA are to be brought to the proper member of the chain of command of the Company.

[GC Ex. 5] As the ALJ noted, in determining whether a rule tends to chill employees in the exercise of their rights, the Board will give the rules a "reasonable reading." *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *see also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Under this standard, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the policy is unlawful. In the instant case, it is clear that the memorandum was not intended to be, and was not an absolute restriction, on the rights of SPAN officers to communicate regarding their terms and conditions of employment. Not only could these employees continue to discuss those issues with other PAE employees and third-parties, but the memo also specifically stated:

> *Nothing in this memo prevents you from filing a charge with or participating, testifying, or assisting in any investigation, hearing, whistleblower proceeding, or other proceeding before any federal, state, or local government agency (e.g. EEOC, NLRB, OSHA, SEC, etc.), nor does anything in this memo preclude, prohibit, or otherwise limit, in any way, your rights and abilities to contact, communicate with, report matters to, or otherwise participate in any whistleblower program administered by any such agencies.*

[GC Ex. 5]

Under *Lutheran Heritage*, if the rule does not explicitly restrict Section 7 activities, the General Counsel may establish that a violation has occurred only if it can prove one of the following:

(1) Employees would reasonably construe the language to prohibit Section 7 activity;

(2) The rule was promulgated in response to union activity; or

(3) The rule has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village-Livonia, 343 NLRB 646.

The ALJ properly found that the rule did not explicitly restrict Section 7 conduct. However, the ALJ incorrectly concluded that PAE promulgated the rule in response to union activity simply because it was issued on the same day as Poulos' final written warning. As Costello explains directly in the memorandum, it was not issued in response to Poulos' union activity several weeks earlier, but because PAE's customer *requested* that Union officers refrain from contacting it on issues that can better be addressed by PAE. As noted above, in response to Poulos' conduct, the U.S. Air Force issued a Corrective Action Request informing PAE that it had "a concern regarding interaction between Poulos and a Government customer, Ray Allen." The contracting officer that issued the CAR specifically asked PAE to take corrective action to address the appropriateness of Poulos' interaction with Allen. Had PAE simply ignored the contracting officer's request, it would have certainly impacted PAE's contract with the U.S. Air Force. Significantly, in the Board decision cited by the ALJ -- *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990) -- there is no indication that the *customer*

requested the restriction, as it did here. If anything, the restriction provides a minor interference with employees' Section 7 rights, which on balance is necessary to preserve PAE's relationship with its customer.[14]

F. The ALJ Erred in Finding PAE Failed to Furnish Ray Allen's Classified Complaint in Violation of Sections 8(a)(1) and (a)(5) (Exceptions 63-70).

In her Decision, the ALJ concluded that, "[b]y failing to bargain with the Union on an accommodation, Respondent violated Section 8(a)(5) and (1) of the Act." [ALJD at p. 2] However, the General Counsel did not allege in its Complaint that PAE failed to bargain *over an accommodation* relating to the production of Raymond Allen's complaint. Instead, in the Complaint, the General Counsel simply alleged that PAE "failed and refused to furnish the Union with" a copy of the customer complaint alleged against Poulos as well as the allegations contained therein. [Consolidated Complaint and Notice of Hearing, dated May 9, 2016, at ¶ 6] Significantly, the ALJ's findings and conclusions went beyond the allegations asserted by the General Counsel in his Complaint.

Nonetheless, even if the ALJ's findings were covered by the allegations contained in the General Counsel's complaint, the Board should reverse these findings. Many of the relevant facts relating to this allegation are undisputed:

[14] In footnote 24 on page 24 of the ALJ's decision, the ALJ concludes that "Respondent's discipline of Poulos, in part for contacting the Customer thereby violating this rule, is a violation of the Action as the rule is found to be unlawful." [ALJD at 24 (*citing Double Eagle Hotel & Casino,* 341 NLRB 112, 123 (2004)] However, the General Counsel did not allege a *Double Eagle* violation nor would such a violation be supported by the evidence in the record. The evidence in the record shows that the allegedly unlawful rule was promulgated on the same day as the final written warning was issue, but the evidence demonstrated that the decision to discipline was made well in advance of March 24, 2016. There is simply no basis for this conclusion.

- That U.S. Air Force representative, Raymond Allen, submitted a complaint to PAE regarding Poulos' conduct on February 16, which was designated by the U.S. Government as a classified document. [ALJD at p. 4]
- That PAE requested the government declassify Ray Allen's complaint, but the government declined. [TR 209]
- That PAE requested Allen created an unclassified version of the complaint, which it provided to Union some point prior to issuing the March 24, 2016 final written warning to him. [ALJD at pp. 3-4, 11]

Despite the ALJ's findings, the record was clear that PAE simply could not furnish to the Union a document that was designated as "classified" by the U.S. Government. The ALJ's attempt to analogize the restrictions placed on PAE as the result of the documents designation as "classified" with cases involving confidentiality concerns should be rejected.[15]

Moreover, the evidence in the record demonstrates that PAE did, in fact, attempt to accommodate the needs of the Union. It requested that the U.S. Government

[15] In the Decision, the ALJ notes the union representatives who attended the February 24 investigatory meeting held "security clearances" which would allow them to see top secret documents in secured areas in certain buildings. [ALJD at p. 25] While the record was not clear whether Lujan and Campbell held the requisite security clearances relating to the documents, the Union's request was that PAE provide it with the documents – not just allow them to view it. Moreover, as described above, Poulos originally wanted an outside attorney to serve as his union representative and, if he had, he certainly would not have been permitted to view a classified document.

declassify Ray Allen's original complaint, but the government declined to do so. [TR 209] Nonetheless, PAE also obtained an unclassified version from Allen, which it subsequently provided to the Union prior to issuing its discipline to Poulos.[16] By that time, Rutledge had already informed Poulos and the Union of the allegations made against Poulos by virtue of the questions that were asked of Poulos, in the presence of his Union representatives, during the February 24, 2016 interview.

For these reasons, and because the Union's request is now moot, PAE asks that the Board reverse the ALJ's Decision finding it violated Sections 8(a)(1) and (a)(5) by failing to provide the Union with a copy of the classified complaint lodged against Poulos.

IV. CONCLUSION.

For the reasons explained above, the ALJ erred in making certain findings and conclusions of law on some of the General Counsel's allegations of unfair labor practices against Respondent. Therefore, to the extent requested in this Brief and the corresponding Exceptions, Respondent respectfully requests that the Board reverses the ALJ's Decision on these points and dismiss the General Counsel's Complaint in its entirety.

[16] There is no basis in the record for the ALJ's conclusion that "[c]ertainly, Allen's classified complaint, not the unclassified complaint, led to Poulos' discipline. [ALJD at p. 26] As the individual who conducted the investigation into Poulos' conduct testified, he had not seen the classified version of the complaint prior to conducting the investigation (or any other point). [TR 190; ALJD at p. 6, fn 12]

DATED: January 13, 2017.

JACKSON LEWIS P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of PAE APPLIED TECHNOLOGIES, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE in Cases 28-CA-170331, et al., was served on January 13, 2017 as follows:

Via E-Gov, E-Filing, U.S. Mail:

Gary Shinners, Executive Secretary
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National Labor Relations Board
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